A **HSBC BANK MALAYSIA BHD v. KANAGA LAKSMI & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[APPLICATION FOR JUDICIAL REVIEW NO: WA-25-131-08-2016]
21 NOVEMBER 2016

B

***COURTS:*** *Industrial Court – Jurisdiction – Whether has inherent jurisdiction – Whether powers emanate from Industrial Relations Act 1967 – Whether meaning of 'court' in s. 151(3) of Financial Services Act 2013 includes Industrial Court – Whether s. 151(3) permits disclosure of documents subject to Bank Negara privilege to Industrial Court proceedings*

C

***STATUTORY INTERPRETATION:*** *Construction of statute – Interpretation – Meaning of 'court' in s. 151(3) of Financial Services Act 2013 – Whether includes court of arbitration such as Industrial Court – Whether s. 151(3) permits disclosure of documents subject to Bank Negara privilege to Industrial Court proceedings – Intention of Parliament – Whether referred to court of law – Interpretation Acts 1948 and 1967, s. 17A*

D

The applicant ('HSBC') had restructured its call centre operations resulting in the retrenchment of the respondents. Consequently, the respondents made

E representations to the Minister of Human Resources pursuant to s. 20 of the Industrial Relations Act 1967 ('IRA'), following which, the matter was referred to the Industrial Court. In the course of the proceedings before the Industrial Court, the respondents applied for certain correspondence between HSBC and Bank Negara Malaysia to be produced. The application was

F objected to by HSBC on the basis that s. 151(1) of the Financial Services Act 2013 ('FSA') prohibited the disclosure of such information. HSBC contended that although s. 151(3) of the FSA permits the disclosure of documents or information that are subject to the Bank Negara privilege in court proceedings, the Industrial Court was not a 'court' for the purposes of s. 151(3) of the FSA. The Industrial Court, in its interim award, ruled that

G the word 'court' when used in s. 151(3) includes the Industrial Court and that the expression 'court proceedings' in the same section encompasses proceedings before the Industrial Court. As a consequence, the court directed HSBC to produce the relevant documents to the respondents' solicitors. Hence, the application for *certiorari* by HSBC to set aside the interim award

H on the basis that the ruling by the Industrial Court amounted to an error of law. The issue for determination in this application was whether the Industrial Court was encompassed within the meaning of the word 'court' for the purposes of s. 151(3) of the FSA.

**Held (allowing application):**

I

**(1)** The word 'court' for the purposes of s. 151(3) of the FSA does not include a court of arbitration such as the Industrial Court. The Industrial Court, being a creation of statute, does not have any inherent

jurisdiction. The powers of the Industrial Court emanate from its empowering legislation, the IRA. On its true construction, s. 151(3) either has the effect of providing for a power of court to require the production of documents that are subject of the Bank Negara privilege or of providing for the manner in which inherent jurisdiction of the court is to be exercised. (para 8)

**(2)** A purposive and contextual construction of s. 151(3) of the FSA will establish that the word 'court' would not include the Industrial Court. Section 17A of the Interpretation Acts 1948 and 1967 allows the court to have regard to the purpose or object of an Act for the purposes of interpreting the provision of the Act. 'Court' is not specifically defined in the FSA. In s. 3 of the Interpretation Act, 'court' is defined as a 'court of competent jurisdiction'. Hence, the use of the word 'court' in the FSA establishes that Parliament had intended to refer to the courts of law and that arbitral tribunals or courts of arbitration would not be encompassed within this term. (para 8)

**(3)** Section 151 provides for the confidentiality of certain information or documents produced by Bank Negara in the administration or enforcement of the provisions of any written law administered by Bank Negara. Section 151(3) provides for the ability of a court to order for proceedings to be held in camera where it appears that a document, that is subject to the Bank Negara privilege, would be likely to be disclosed in court proceedings. Where the court order for proceedings to be held *in camera*, the legal consequence would be that the document or information in question would be subject to a secrecy obligation. (paras 13 & 14)

**(4)** Section 151 does not specifically provide for the ability of the court to order the production of any document that is subject to the Bank Negara privilege. All it provides is the discretion of the court to order that proceedings be held *in camera* here it appears that a privileged document is likely to be disclosed. However, the word 'court' here would necessarily refer to a court of law, and not to a court of arbitration like the Industrial Court. As a result, the application for *certiorari* was allowed. (paras 15, 18 & 19)

**Case(s) referred to:**

*Isuta International Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor [2013] 8 CLJ 1040 HC* ***(dist)***

*Kanaga Laksmi Paramasivam & Ors v. HSBC Bank Malaysia Bhd [2016] 2 LNS 731* ***(refd)***

*Lee Wah Bank Limited v. National Union of Bank Employees [1980] 1 LNS 115* ***(refd)***

**Legislation referred to:**

Companies Act 1965, s. 226(3)
Financial Services Act 2013, ss. 133, 134, 151(1), (3), 183, Schedule 11 item 6
Industrial Relations Act 1967, s. 20
Interpretation Acts 1948 and 1967, ss. 3, 17A

A *For the applicant - Sivabalah Nadarajah & Jamie Goh Moon Hoong; M/s Shearn Delamore & Co*
*For the respondent - S Muhendaran; M/s Muhendaran Sri*
*For Bank Negara Malaysia, as amicus curiae - Khairul Fazly Kamarudin & Wan Nur Atiqah*

B *Reported by S Barathi*

## JUDGMENT

**Azizul Azmi Adnan JC:**

C **[1]** The crisp issue for determination in this application was whether the Industrial Court is encompassed within the meaning of the word "court" for the purposes of s. 151(3) of the Financial Services Act 2013 (the FSA).

**Background**

D **[2]** The applicant, HSBC Bank Malaysia Bhd (HSBC), had restructured its call centre operations, as a result of which the respondents were retrenched. The respondents thereafter made representations to the Minister of Human Resources pursuant to s. 20 of the Industrial Relations Act 1967, following which the matter was referred to the Industrial Court.

E **[3]** In the course of proceedings before the Industrial Court, the respondents applied for certain correspondence between HSBC and Bank Negara Malaysia to be produced for the purposes of the Industrial Court proceedings. These included the letter from Bank Negara to HSBC approving the outsourcing of its call centre operations.

F **[4]** HSBC objected to the application, on the basis that s. 151(1) of the FSA prohibited the disclosure of such information. Counsel for HSBC contended that, although s. 151(3) permits the disclosure of documents or information that are subject to the Bank Negara privilege in court proceedings, the Industrial Court is not a "court" for the purposes of
G s. 151(3) of the FSA.

**[5]** In an interim award delivered on 16 June 2016[1], the Industrial Court ruled that the word "court" when used in s. 151(3) includes the Industrial Court, and that the expression "court proceedings" in the same section encompasses proceedings before the Industrial Court. As a consequence, the
H court directed HSBC to produce the relevant documents to the respondents' solicitors.

**[6]** Before me, HSBC filed an application for *certiorari* to set aside the interim award, on the basis that the ruling by the Industrial Court amounted to an error of law. When the application for leave of court came up before
I me, I had requested Mr Sivabalah to invite Bank Negara to appear as *amicus curiae* in this matter.

## Analysis And Decision

**[7]** Section 151(3) of the FSA provides as follows:

> (3) In any court proceedings, where any document or information referred to in this section is likely to be disclosed, the court, of its own motion, or at the application of a party to the proceedings or the Bank[2], may order for such proceedings to be held *in camera* and in such case, the document or information shall be secret as between the court and parties or the Bank thereto, and no such party shall disclose such document or information to any other person.

**[8]** In my judgment, the word "court" for the purposes of s. 151(3) of the FSA does not include a court of arbitration such as the Industrial Court. The reasons for my coming to this decision were twofold:

(a) firstly, it is well established that the Industrial Court is a creation of statute and does not have any inherent jurisdiction. The powers of the Industrial Court must therefore emanate from its empowering legislation, the Industrial Relations Act 1967. See *Lee Wah Bank Limited v. National Union of Bank Employees*[3], where it was held as follows:

> How wide then are the powers of the Industrial Court under section 30(6)? According to section 30(6) of the Act the Industrial Court in making an award should not be bound to restrict itself to the specific relief asked for nor to the demands of the parties. The Industrial Court in making the award may include in the award any matter which it thinks necessary or expedient for the purpose of settling the dispute or the reference. That is the gist in clause (6) of section 30 of the Act. In my view the apparent broadness of the language used here does not go beyond what is already conferred on any person (or body) by section 40(1) of the Interpretation Act, 1967. Section 40(1) reads as follows:
>
> > 40(1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.
>
> These are powers which are necessarily implied and nothing more. Since the Industrial Court is a creature of the Industrial Relations Act, 1967 its powers must be discovered only from the four corners of the Act - expressly or by necessary implication - see also *Baroness Wenlock v. River Dee Company* 36 Ch D 674 and *The Attorney-General & Ephraim Hutchings v. The Directors, etc, of The Great Eastern Railway Company* (1880) 5 App Cas 473.

In my view, on its true construction, s. 151(3) either has the effect of providing for a power of court to require the production of documents that are the subject of the Bank Negara privilege, or of providing for the manner in which the inherent jurisdiction of the court is to be exercised when a court orders for the production of such documents.

If s. 151(3) is an empowering provision, then it is clear that the provision cannot provide for a power of the Industrial Court, for that would be contrary to the principle that the Industrial Court derives its powers entirely from the four corners of the Industrial Relations Act 1967.

On the other hand, if s. 151(3) has the effect of simply providing for the manner in which a curial discretion is to be exercised when dealing with documents that are subject to the Bank Negara privilege, then equally the provision could not be taken to refer to the Industrial Court, as the Industrial Court has no inherent jurisdiction.

At para. 13 below, I discuss the two alternative interpretations of s. 151(3) of the FSA.

(b) secondly, a purposive and contextual construction of s. 151(3) will establish that the word "court" would not include the Industrial Court. Section 17A of the Interpretation Acts 1948 and 1967 (the Interpretation Act) allows this court to have regard to the purpose or object of an Act for the purposes of interpreting the provision of the Act.

"Court" is not specifically defined in the FSA. In s. 3 of the Interpretation Act, "court" is defined simply as a "court of competent jurisdiction".

It will be seen that the word "court" appears in various sections of the FSA. In my judgment, the use of the word "court" in the FSA establishes that Parliament had intended to refer to the courts of law and that arbitral tribunals or courts of arbitration would not be encompassed within this term. The following instances support this construction:

(i) section 133 of the FSA provides for the secrecy of customer information. Section 134 permits the disclosure of such information for certain purposes and in certain instances. These include where the disclosure is being made in compliance with a court order. The specific provision in item 6 of the Eleventh Schedule to the FSA provides as follows:

> Compliance with a court order made by a court not lower than a Sessions Court.

This provision therefore suggests the word "court", where it is used in the FSA, is intended to refer to the courts of law and would not include a court of arbitration such as the Industrial Court.

(ii) where in the FSA, Parliament had intended to refer to other bodies exercising any *quasi*-judicial function, the FSA has expressly provided as such. An example of this is s. 183, where reference is made to proceedings in any court or tribunal. It is a principle of construction that words used in one section of an Act would be presumed to mean the same thing when used in another section.

Because in s. 183, Parliament had made specific references to a court and a tribunal, the implication would be that the word "court" when used elsewhere in the FSA would not include a tribunal and would be limited to courts of law.

**[9]** Counsel for the respondents referred to the case of *Isuta International Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor*[4] as authority for the proposition that the word "court" would encompass the Industrial Court. However, in my judgment, this case can be distinguished on the basis that it was concerned with the effect of a winding up order on a company pursuant to s. 226(3) of the Companies Act 1965. This provision, unlike s. 151(3) of the FSA, does not purport to confer any power to the court, but rather provides for a restriction in proceedings without leave of the High Court.

**[10]** The *ratio decidendi* of this case is found at para. 20 of the judgment:

> The words 'action or proceeding' (taken separately or together, irrespective) as found in s. 263(2) (or for that matter in s. 226(3)) of the COA), must **also be accorded a meaning not in isolation but in the context of the totality of the subject provision**. Read in that context it followed then that the words 'action or proceeding' referred to some mode or step adopted or taken in the judicial arena to enforce a legal right or where some form of 'adjudication' of interest was involved. A clearance from the High Court by way of leave was necessary to commence or proceed with that 'action or proceeding' when it was brought against a company where a creditors' winding-up, whether voluntary or compulsory was underway. (emphasis added)

**[11]** Therefore, the meaning of any phrase in a provision must be understood in the context of the provision as a whole. A contextual construction of the word "court" in this case, as explained in para. 8(b) above, excludes the Industrial Court.

**[12]** The foregoing was sufficient to dispose of the application before me. For completeness, I address in the following paragraphs the two alternative interpretations of s. 151 of the FSA.

**The Alternative Constructions**

**[13]** Section 151 provides for the confidentiality of certain information or documents produced by Bank Negara in the administration or enforcement of the provisions of any written law administered by Bank Negara. These information or documents include any rating or assessment of any person regulated by Bank Negara, and any order or direction issued by Bank Negara to such person[5]. I have referred to these documents or information as being subject to the Bank Negara privilege.

**[14]** Section 151(3) provides for the ability of a court to order for proceedings to be held *in camera* where it appears that a document that is subject to the Bank Negara privilege would be likely to be disclosed in court

proceedings. Where the court orders for proceedings to be held *in camera*, the legal consequence would be that the document or information in question would be subject to a secrecy obligation.

**[15]** It will be apparent that the draftsperson has employed an ellipsis in the drafting of this provision, because s. 151 does not specifically provide for the ability of the court to order the production of any document that is subject to the Bank Negara privilege. All it provides is the discretion of the court to order that proceedings be held *in camera* where it appears that a privileged document is likely to be disclosed.

**[16]** One possibility is that the power is implied by s. 151 itself, on the basis that if the court has the discretion to order that proceedings are to be held *in camera*, then it would follow by necessary implication that the court would be empowered to order the production of the document in the first place.

**[17]** The alternative interpretation is that the power of the court to order the production of any document would be an inherent power of the court, and that s. 151(3) merely provides firstly guidance to the court as to how to exercise its discretion in making any order for the production of documents that are subject to the Bank Negara privilege, and secondly for the consequences that flow from any order for proceedings to be held *in camera*.

**[18]** As I have explained at para. 8(a) above, whichever interpretation is adopted, the conclusion would remain the same: the word "court" here would necessarily refer to a court of law, and not to a court of arbitration like the Industrial Court. As a result, it will not be necessary for me for the present purposes to express a view on which would be the correct construction of s. 151 of the FSA.

**Orders**

**[19]** The application for *certiorari* was therefore allowed. Parties had agreed beforehand that there was to be no order as to costs.

**[20]** I wish to record my appreciation to the representatives from Bank Negara Malaysia who greatly assisted the court in appearing as *amicus curiae*.

**Endnote**

1. Reported at *Kanaga Laksmi Paramasivam & Ors v. HSBC Bank Malaysia Bhd* [2016] 2 LNS 731
2. "Bank" here means Bank Negara
3. [1980] 1 LNS 115; [1981] 1 MLJ 169
4. [2013] 8 CLJ 1040; [2013] 4 ILR 246
5. Section 151(2). Note however that this definition is non-exhaustive.